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September 30, 2018

VIA ECF

Hon. Denise L. Cote
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street, Room 1610
New York, NY 10007-1312

Re: *MZ Wallace Inc. v. Sue Fuller, et al.*, 18-cv-2265 (DLC)

Dear Judge Cote:

On behalf of plaintiff MZ Wallace, Inc., we write because, regrettably, a dispute has arisen around deposition scheduling that requires judicial resolution. The issue is whether defendants Sue Fuller and Black Diamond Group, Inc. are entitled to impede plaintiff MZ Wallace's ability to conduct deposition discovery by limiting the time of witness depositions to 3.5 hours.

By way of background, in the last week of August, Defendants suggested producing two of their witnesses (Carrie Hall and Kate Falchi) for deposition back-to-back on the same day and inquired whether MZ Wallace "expect[s] to need half days" with these individuals or whether full days were necessary. [Ex. A]. After the Labor Day holiday, Defendants followed up, again inquiring whether MZ Wallace "expect[s] to need more than half a day on October 3 for Carrie Hall and Kate Falchi." [Ex. B]. MZ Wallace responded that "so long as they are not being presented as 30(b)(6) witnesses, we do [not] expect that we will need more than half a day for either." [Ex. B]. Defendants wrote back confirming that Ms. Hall and Ms. Falchi were not 30(b)(6) designees and, because of typo in the previous correspondence, sought clarification: "I think there is a missing word in your email below but I assume you therefore are willing to do half days with each of them, which means we can do them the same day." [Ex. B] MZ Wallace wrote back confirming this was the case. [Ex. B].

Last Wednesday and Thursday, MZ Wallace conducted the depositions of defendant Sue Fuller and Alan Lunder, the CEO of defendant Black Diamond Group. In MZ Wallace's view, these witnesses took effort to slow down the progress of the examinations with non-responsive answers, an inordinate number of requests to re-ask, repeat, or rephrase the questions, and uncomfortably lengthy periods of silent

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contemplation before responding to questions and when considering documents. Adding further delay to the proceedings were defense counsel's excessive and suggestive speaking objections (*e.g.*, "Vague" (36 instances), "Misstates the testimony" (25 instances), "Misstates the document" (11 instances), "Asked and Answered" (18 instances), "calls for speculation" / "speculative" (31 instances)),¹ which continued to be made despite the request that the objection be limited to "Objection," "Object to the form of the question," or "Form," as is typical practice.²

Given the approach that Defendants took with respect to the first two depositions of their witnesses, on Friday morning the undersigned wrote to Defendants advising that the depositions of Defendants' remaining witnesses, Ms. Hall and Ms. Falchi, would likely not be completed in a half day and additional arrangements would have to be made:

Having sat through the depositions of Ms. Fuller and Mr. Lunder this week, we now anticipate that the depositions of Ms. Falchi and Ms. Hall will take longer than originally anticipated. These depositions need to be split over two days. We are prepared to conduct one of these depositions on 10/3, as originally scheduled. The other can be done on 10/2 or 10/4 or 10/5, depending on the witnesses' schedules. We are flexible. Please advise. [Ex. C]

Despite MZ Wallace's willingness to accommodate the witnesses' schedules and despite there being no indication that either Ms. Hall or Ms. Falchi has a scheduling conflict, Defendants refuse to produce their witnesses for more than 3.5 hours and have taken the position that MZ Wallace, by having previously accepted Defendants' request to conduct the depositions of Ms. Hall and Ms. Falchi on the same day, has waived its right to conduct a deposition as per the Federal Rules of Civil Procedure. Defendants'

¹ Because the deposition testimony has been designated highly confidential, the transcripts are not annexed hereto. MZ Wallace is happy to provide the transcripts to the Court for *in camera* inspection if that would be helpful.

² "Objections as to the form of the question shall be made by opposing counsel, who shall simply state, 'Objection.' The objecting counsel shall not speak any additional words concerning the basis of the objection unless a clarification is requested. Any clarification as to the basis of the objection shall be stated as succinctly as possible, such as, 'Argumentative,' or 'Ambiguous,' or 'Asked and Answered.' Any violations of these guidelines may lead to the imposition of sanctions." *Syntel Sterling Best Shores Mauritius Ltd. v. Trizetto Grp.*, 2018 WL 4489286, 10 (S.D.N.Y. Sept. 19, 2018); *see Meyer Corp. U.S. v. Alfay Designs, Inc.*, 2012 WL 3536987, 4 (E.D.N.Y. Aug. 13, 2012) ("[Attorneys] must refrain, when making an objection, from stating that a question is vague, ambiguous or calls for speculation. Counsel should simply state, 'Objection as to form.' Similarly, objections as to foundation should be simply stated as such: 'Objection, foundation.' There should not be any comment that a question is speculative. Elaboration is permitted only where examining counsel requests the basis of the objection.")

H A N D B A L D A C H I N A S S O C I A T E S L L P

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position is unreasonable and unjustified and it would appear that Defendants are being difficult solely for the sake of being difficult.

Plaintiff respectfully requests the Court order Defendants to produce their witnesses for the full seven hours MZ Wallace is entitled to under Fed. R. Civ. P. 30(d)(1). While MZ Wallace certainly has no desire to inconvenience witnesses or counsel by taking more time than is necessary to conduct these depositions, Defendants have no right to limit MZ Wallace's ability to conduct adequate discovery by unilaterally restricting their witnesses' availability to 3.5 hours.

MZ Wallace is available for conference at the Court's convenience.

Respectfully submitted,

/s/ Adam B. Michaels
Adam B. Michaels

cc: All counsel of record (via ECF)

EXHIBIT A

Adam Michaels

From: Bernstein, David H. <dhbernstein@debevoise.com>
Sent: Tuesday, August 28, 2018 9:21 PM
To: Adam Michaels
Cc: Saba, Kate; Marc Reiner; Ford, Christopher S
Subject: RE: MZ Wallace, Inc. v. Fuller, et al.

Adam, those dates work for us. We will send deposition notices in the coming days.

In addition, we confirm that you will depose Sue Fuller on September 26 and Alan Lunder on September 27. We will be in touch shortly to confirm the dates for the other two deponents that you requested. Do you expect to need half days for Carrie Hall and Kate Falchi, or do you want a full day with each (in which case we will need to pick separate days as we cannot dual track those depositions).

Please indicated which witnesses will be addressing which 30(b)(6) topics; we will do the same. I assume we can conduct the 30(b)(6) depositions concurrently with the relevant witness' personal depositions, but please confirm.

David

**Debevoise
& Plimpton**

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Partner

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From: Adam Michaels [<mailto:amichaels@hballp.com>]
Sent: Tuesday, August 28, 2018 6:37 PM
To: Bernstein, David H.
Cc: Saba, Kate; Marc Reiner; Ford, Christopher S
Subject: RE: MZ Wallace, Inc. v. Fuller, et al.

On deposition scheduling, we are generally agreeable to your proposal, but have a conflict on 9/20. We propose starting on 9/21 instead, with the following schedule:

9/21	Lucy Eustice Wallace
9/24	Kevin Mogyoros
9/25	Monica Zwirner
9/26	Sarah Broach

For 9/26, we can conduct the depositions of Sue Fuller and Sarah Broach contemporaneously, or we can take Sue Fuller any other time that week or the next.

EXHIBIT B

Adam Michaels

From: Adam Michaels
Sent: Friday, September 07, 2018 8:35 PM
To: 'Bernstein, David H.'
Cc: Ford, Christopher S; Marc Reiner; Saba, Kate
Subject: RE: MZ Wallace, Inc. v. Fuller, et al.

Confirmed.

Adam B. Michaels

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From: Bernstein, David H. [mailto:dhbernstein@debevoise.com]
Sent: Friday, September 07, 2018 8:33 PM
To: Adam Michaels <amichaels@hballp.com>
Cc: Ford, Christopher S <csford@debevoise.com>; Marc Reiner <mreiner@hballp.com>; Saba, Kate <ksaba@debevoise.com>
Subject: Re: MZ Wallace, Inc. v. Fuller, et al.

Adam,

Carrie and Kate are not going to be our 30b6 witnesses. I think there is a missing word in your email below but I assume you therefore are willing to do half days with each of them, which means we can do them the same day. Please confirm.

David

David H. Bernstein
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return e-mail (including the original message in your reply) and by telephone (you may call us collect in New York at [1-212-909-6000](tel:1-212-909-6000)) and then delete and discard all copies of the e-mail. Thank you.

On Sep 7, 2018, at 7:07 PM, Adam Michaels <amichaels@hballp.com> wrote:

1. We will investigate Mogyoros's and Broach's availability and get back to you. Thank you for accommodating.
2. Regarding Falchi and Hall, so long as they are not being presented as 30(b)(6) witnesses, we do expect that we will need more than half a day for either. Kindly confirm.
3. For MZ Wallace, Mogyoros will be the 30(b)(6) on the overwhelming majority of topics. We will provide further detail in the coming days.

Adam B. Michaels

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From: Ford, Christopher S [<mailto:csford@debevoise.com>]

Sent: Friday, September 07, 2018 1:53 PM

To: Adam Michaels <amichaels@hballp.com>

Cc: Marc Reiner <mreiner@hballp.com>; Bernstein, David H. <dhbernstein@debevoise.com>; Saba, Kate <ksaba@debevoise.com>

Subject: RE: MZ Wallace, Inc. v. Fuller, et al.

Adam,

We agree to move the Zwirner deposition to 9/21 and the Eustice deposition to 9/25. We were expecting to take Mogyoros' deposition on 9/24, however. Would it be possible to preserve that date, and reschedule Broach for another day?

Also, per David's email of August 28, please let us know whether you expect to need more than half a day on October 3 for Carrie Hall and Kate Falchi, as we would need to schedule separate full days for those witnesses.

Thanks,
Chris

<image001.gif>

Christopher S. Ford
Associate

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From: Bernstein, David H.
Sent: Friday, September 07, 2018 12:49 PM
To: 'Adam Michaels'
Cc: Saba, Kate; 'Marc Reiner'; Ford, Christopher S
Subject: RE: MZ Wallace, Inc. v. Fuller, et al.

We will check with our client

Can you let us know who will covering which 30(b)(6) topics?

<image002.gif>

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Partner

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From: Adam Michaels [<mailto:amichaels@hballp.com>]
Sent: Friday, September 07, 2018 12:26
To: Ford, Christopher S
Cc: Saba, Kate; Bernstein, David H.; Marc Reiner
Subject: RE: MZ Wallace, Inc. v. Fuller, et al.

Chris –

A scheduling issue has arisen with the depositions. Please let me know if this reordering is workable for you.

9/21	Monica Zwirner
9/24	Sarah Broach
9/25	Lucy Wallace Eustice
9/26	Kevin Mogyoros

Adam B. Michaels

Partner

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EXHIBIT C

Adam Michaels

From: Adam Michaels
Sent: Friday, September 28, 2018 11:56 AM
To: Bernstein, David H.; 'Ford, Christopher S'; Saba, Kate
Cc: Marc Reiner
Subject: MZ Wallace, Inc. v. Sue Fuller, et al. - Next week's depositions.

David / Chris -

Having sat through the depositions of Ms. Fuller and Mr. Lunder this week, we now anticipate that the depositions of Ms. Falchi and Ms. Hall will take longer than originally anticipated. These depositions need to be split over two days. We are prepared to conduct one of these depositions on 10/3, as originally scheduled. The other can be done on 10/2 or 10/4 or 10/5, depending on the witnesses' schedules. We are flexible. Please advise.

Adam B. Michaels

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